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11 UNITED STATES DISTRICT COURT
12 DISTRICT OF NEVADA
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14 WILLIAM FRENCH,) 3:13-cv-00209-HDM-WGC
15 Plaintiff,)
16 vs.) ORDER
17 CARSON CITY, BRIAN MENDOZA, JIMMY)
18 SURRATT, and DAVE RAMSEY,)
19 Defendants.)
_____)

20 Plaintiff William French ("plaintiff") filed the instant
21 complaint in state court on March 25, 2013, alleging eleven state
22 and federal claims against defendants Brian Mendoza ("Mendoza") and
23 Jimmy Surratt ("Surratt"), Dave Ramsey ("Ramsey"), and Carson City
24 (collectively "defendants"). Defendants removed to this court on
25 April 23, 2013, and filed for summary judgment on all of
26 plaintiff's claims on March 26, 2014. Plaintiff has opposed
27 defendants' motion (#26), and defendants have replied (#29).
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Facts

The following facts are taken primarily from defendants' motion for summary judgment and attached exhibits. Plaintiff largely has not taken issue with the facts as presented by defendants, except where specifically noted.

On August 9, 2011, at around 11:20 p.m., Carson City deputies Mendoza and Surratt were separately dispatched to an apartment complex in Carson City on reports that a subject was carrying a bottle of alcohol and knocking on the doors of people he did not know. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 5); *id.* Ex. 2 (Surratt Dep. 5-6); *id.* Ex. 3). Mendoza arrived first and observed plaintiff "having a very loud conversation" with a tenant at the tenant's front door.¹ (Mot. Summ. J. Ex. 1 (Mendoza Dep. 5-6)). Plaintiff was wearing what appeared to be women's panties on his head and had a bottle in his hand containing what appeared to be clear alcohol. *Id.* Ex. 1 (Mendoza Dep. at 6); *id.* Ex. 3. Mendoza exited his vehicle and approached plaintiff, who began walking toward the back of the building. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 6). Mendoza followed plaintiff and told him to have a seat, which plaintiff did. *Id.* Ex. 1 (Mendoza Dep. 5-6); *id.* Ex. 3.

Mendoza asked plaintiff for his name. Plaintiff responded "Robert French." (Mot. Summ. J. Ex. 1 (Mendoza Dep. 10)). Mendoza asked plaintiff why he was in the area, and plaintiff responded that he was just trying to get some cigarettes. *Id.* By this time,

¹ In his police report, Mendoza described it as a "very vocal conversation." (Mot. Summ. J. Ex. 3). Plaintiff argues that this description, written closer in time to the events, is inconsistent with Mendoza's later recollection during his deposition that the conversation was "very loud."

1 Mendoza had ascertained that plaintiff was intoxicated. *Id.*
2 Plaintiff submitted to a preliminary breath test, which registered
3 a blood alcohol level of .215. (Mot. Summ. J. Ex. 3). Mendoza
4 checked plaintiff for warrants under the name "Robert French," and
5 finding none then began trying to find a way to get plaintiff home.
6 *Id.* at 11. Plaintiff told Mendoza that he lived in Douglas,
7 Nevada. *Id.* Ex. 1 (Mendoza Dep. at 10-11). At Mendoza's request,
8 plaintiff provided a phone number for someone who could pick him
9 up, but the number was disconnected. *Id.* Plaintiff then asked
10 Mendoza to give him a ride to Indian Hills, and Mendoza replied
11 that he could not as Indian Hills was in another county. *Id.* at
12 11-12. Mendoza offered to get plaintiff a cab, but plaintiff
13 stated he did not have any money. *Id.* at 12.

14 In the meantime, Surratt had arrived on scene, observed
15 Mendoza speaking with plaintiff, and proceeded to interview one of
16 the apartment tenants. (Mot. Summ. J. Ex. 2 (Surratt Dep. 6-7);
17 *id.* Ex. 3). Surratt contacted Mendoza and relayed what the tenant
18 had told him: that the plaintiff, wearing women's underwear on his
19 head, had knocked on the tenant's door and tried to sell the tenant
20 his bottle of alcohol. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 12-13);
21 *id.* Ex. 2 (Surratt Dep. 6-7, 11); *id.* Ex. 3).

22 Mendoza decided to arrest plaintiff for disorderly conduct.
23 (Mot. Summ. J. Ex. 1 (Mendoza Dep. 13)). Mendoza based his
24 decision on: (1) the fact that when he arrived, he heard plaintiff
25 yelling profanities at the tenant with whom he'd been speaking; (2)
26 what the tenant and the reporting party had said about plaintiff's
27 conduct; and (3) plaintiff's demeanor and intoxication. *Id.* Once
28 the decision had been made, Surratt brought out his police canine

1 to "deter resistance." (Mot. Summ. J. Ex. 2 (Surratt Dep. 7)).

2 Mendoza informed plaintiff he was going to arrest him for
3 disorderly conduct and asked him to put his hands behind his back.
4 (Mot. Summ. J. Ex. 1 (Mendoza Dep. 14)). From his seated position,
5 plaintiff said he wasn't going to jail and refused to put his hands
6 behind his back.² (Mot. Summ. J. Ex. 1 (Mendoza Dep. 14)).

7 Instead, he leaned forward and "kind of clenched his arms together
8 in front of him." *Id.* Mendoza tried to pull plaintiff's right arm
9 behind his back, but plaintiff did not release his grip and
10 resisted Mendoza's pressure to move his arm. *Id.* at 14-15.

11 Mendoza told plaintiff again to cooperate and put his hands behind
12 his back, but plaintiff refused. *Id.* at 15. Mendoza then removed
13 his taser gun, placed it on plaintiff's back, and told plaintiff
14 that if he did not cooperate and put his hands behind his back he
15 would be tased. *Id.*; (Mot. Summ. J. Ex. 3). Instead, plaintiff
16 continued to try standing up. Mendoza told plaintiff to stop
17 resisting and tried to prevent plaintiff from standing up. *Id.* at
18 15-16. When plaintiff attempted to stand up again, Mendoza applied
19 a contact tase to his back. *Id.* at 18. Plaintiff fell forward
20 onto his knees.³ *Id.*; Mot. Summ. J. Ex. 3.

21 Meanwhile, Surratt had been standing in front of plaintiff
22 with his police canine. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 16)).
23 When Surratt observed plaintiff trying to get to his feet in "an
24 aggressive manner," Surratt said he warned that if plaintiff did

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26 ² Plaintiff admits that he refused to put his arms behind his back.
(Pl Compl. ¶ 13).

27 ³Plaintiff argues that a reasonable juror could conclude that plaintiff
28 fell forward from the contact tase and was not, as suggested by the
defendants, being aggressive.

1 not stop he would deploy the canine and the canine would bite. *Id.*
2 Ex. 2 (Surratt Dep. 14). Mendoza did not testify that Surratt
3 deployed the canine only after a warning. Surratt then deployed
4 the canine, who bit plaintiff in the buttocks. (Mot. Summ. J. Ex.
5 2 (Surratt Dep. 12-13); *id.* Ex. 1 (Mendoza Dep. 19-20)).

6 According to Surratt, plaintiff was becoming more "aggressive"
7 and "violent." (Mot. Summ. J. Ex. 2 (Surratt Dep. 16-17)). As
8 plaintiff tried to get up again, Surratt deployed the canine once
9 more; this time, the canine bit plaintiff on the left forearm and
10 held. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 20); *id.* Ex. 2 (Surratt
11 Dep. 16)). Plaintiff began striking the canine several times in
12 the "few seconds" before Surratt recalled him. (Mot. Summ. J. Ex.
13 1 (Mendoza Dep. 20-21); *id.* Ex. 2 (Surratt Dep. 17)). While
14 plaintiff was striking the canine, Surratt continued to command
15 plaintiff to put his arms behind his back. *Id.* Ex. 3. After the
16 canine released, plaintiff attempted to stand again. (Mot. Summ.
17 J. Ex. 1 (Mendoza Dep. 21)). Mendoza responded by shooting
18 plaintiff in the back with a taser dart. (Mot. Summ. J. Ex. 1
19 (Mendoza Dep. 22)). Plaintiff calmed down, and Mendoza handcuffed
20 him and took him into custody. (Mot. Summ. J. Ex. 1 (Mendoza Dep.
21 23-24)).

22 As alleged in his complaint (and unaddressed by defendants),
23 plaintiff's forearm wound was "akin to a shark bite" with "chunks"
24 missing from it. (Pl. Compl. ¶ 16). Mendoza called fire and
25 rescue, which responded and bandaged plaintiff's arm. (Mot. Summ.
26 J. Ex. 1 (Mendoza Dep. 30); *id.* Ex. 3). Mendoza then transported
27 plaintiff to the hospital, where the wound was cleaned and x-rayed.
28 (Mot. Summ. J. Ex. 1 (Mendoza Dep. 31-32)).

1 While at the hospital, plaintiff stated that his real name was
2 not "Robert French" but was instead "William French"; Robert was in
3 fact plaintiff's brother. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 34);
4 *id.* Ex. 3). Running a report under "William French," Mendoza
5 discovered that plaintiff was on probation with a no-alcohol
6 clause. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 34)).

7 Upon release from the hospital, plaintiff was taken to Carson
8 City Jail. (Mot. Summ. J. Ex. 1 (Mendoza Dep. 35)). He was
9 eventually charged with: (1) mistreatment of a police animal; (2)
10 using false information to avoid prosecution; (3) resisting a
11 public officer; (4) disorderly conduct; and (5) alternative
12 sentencing violation (probation). (Mot. Summ. J. Ex. 1 (Mendoza
13 Dep. 37-38); *id.* Ex. 3). In the end, plaintiff pleaded guilty to
14 providing false information to avoid prosecution, and the remaining
15 claims were dismissed. (Pl. Compl. ¶ 21).

16 While in the Carson City Jail, plaintiff's forearm wound was
17 treated by defendant Ramsey, who did daily dressing changes, kept
18 the wound clean, and gave plaintiff antibiotics and pain
19 medications as needed. (Mot. Summ. J. Ex. 4 (Ramsey Dep. 8)).
20 Initially, the wound seemed to be healing, but one day Ramsey
21 noticed a change for the worse. *Id.* at 9-10. Ramsey called a
22 doctor for a second opinion; the doctor advised that while he did
23 not quite see what Ramsey saw, plaintiff should be sent for wound
24 care at the hospital if Ramsey thought the wound had worsened. *Id.*
25 at 10; Mot. Summ. J. Ex. 5. Plaintiff was evaluated by a doctor
26 with the Carson Surgical Group on September 13, 2011, and
27 thereafter received wound treatment at the hospital two to three
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1 times a week.⁴ (Mot. Summ. J. Ex. 4 (Ramsey Dep. 10); *id.* Ex. 5).
2 Eventually doctors determined plaintiff needed surgery, which he
3 underwent on November 28, 2011, and December 5, 2011. (Mot. Summ.
4 J. Exs. 7 & 8).

5 Plaintiff filed the instant complaint asserting claims based
6 on his arrest and subsequent medical care. Defendants move for
7 summary judgment on all claims, both on the merits and, where
8 applicable, on grounds of qualified or discretionary immunity.
9 Defendants argue the material facts are not in dispute and they are
10 therefore entitled to judgment as a matter of law.

11 **Standard**

12 "The court shall grant summary judgment if the movant shows
13 that there is no genuine issue as to any material fact and the
14 movant is entitled to judgment as a matter of law." Fed. R. Civ.
15 P. 56(a). The burden of demonstrating the absence of a genuine
16 issue of material fact lies with the moving party, and for this
17 purpose, the material lodged by the moving party must be viewed in
18 the light most favorable to the nonmoving party. *Adickes v. S.H.*
19 *Kress & Co.*, 398 U.S. 144, 157 (1970); *Martinez v. City of Los*
20 *Angeles*, 141 F.3d 1373, 1378 (9th Cir. 1998). A material issue of
21 fact is one that affects the outcome of the litigation and requires
22 a trial to resolve the differing versions of the truth. *Lynn v.*
23 *Sheet Metal Workers Int'l Ass'n*, 804 F.2d 1472, 1483 (9th Cir.

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25 ⁴ Ramsey testified that it was twice a week, but defendants maintain
26 Carson City Sheriff's Office records show plaintiff was actually treated
27 three times a week. (Mot. Summ. J. 7 n.3). Plaintiff suggests that these
28 records might actually mean that plaintiff was *supposed* to be treated three
times a week and that Ramsey, who recollected sending plaintiff only twice
a week, may have been deliberately indifferent in failing to adhere to the
prescribed course of treatment.

1 1986); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir.
2 1982).

3 Once the moving party presents evidence that would call for
4 judgment as a matter of law at trial if left uncontroverted, the
5 respondent must show by specific facts the existence of a genuine
6 issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
7 250 (1986). "[T]here is no issue for trial unless there is
8 sufficient evidence favoring the nonmoving party for a jury to
9 return a verdict for that party. If the evidence is merely
10 colorable, or is not significantly probative, summary judgment may
11 be granted." *Id.* at 249-50 (citations omitted). "A mere scintilla
12 of evidence will not do, for a jury is permitted to draw only those
13 inferences of which the evidence is reasonably susceptible; it may
14 not resort to speculation." *British Airways Bd. v. Boeing Co.*, 585
15 F.2d 946, 952 (9th Cir. 1978); see also *Daubert v. Merrell Dow*
16 *Pharmaceuticals, Inc.*, 509 U.S. 579, 596 (1993) ("[I]n the event
17 the trial court concludes that the scintilla of evidence presented
18 supporting a position is insufficient to allow a reasonable juror
19 to conclude that the position more likely than not is true, the
20 court remains free . . . to grant summary judgment."). Moreover,
21 "[i]f the factual context makes the non-moving party's claim of a
22 disputed fact implausible, then that party must come forward with
23 more persuasive evidence than otherwise would be necessary to show
24 there is a genuine issue for trial." *Blue Ridge Ins. Co. v.*
25 *Stanewich*, 142 F.3d 1145, 1149 (9th Cir. 1998) (citing *Cal.*
26 *Architectural Bldg. Prods., Inc. v. Franciscan Ceramics, Inc.*, 818
27 F.2d 1466, 1468 (9th Cir. 1987)). Conclusory allegations that are
28 unsupported by factual data cannot defeat a motion for summary

1 judgment. *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989).

2 If the nonmoving party fails to present an adequate opposition
3 to a summary judgment motion, the court need not search the entire
4 record for evidence that demonstrates the existence of a genuine
5 issue of fact. See *Carmen v. San Francisco Unified Sch. Dist.*, 237
6 F.3d 1026, 1029-31 (9th Cir. 2001) (holding that "the district
7 court may determine whether there is a genuine issue of fact, on
8 summary judgment, based on the papers submitted on the motion and
9 such other papers as may be on file and specifically referred to
10 and facts therein set forth in the motion papers"). The district
11 court need not "scour the record in search of a genuine issue of
12 triable fact," but rather must "rely on the nonmoving party to
13 identify with reasonable particularity the evidence that precludes
14 summary judgment." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir.
15 1996) (quoting *Richards v. Combined Ins. Co.*, 55 F.3d 247, 251 (7th
16 Cir.1995)). "[The nonmoving party's] burden to respond is really
17 an opportunity to assist the court in understanding the facts. But
18 if the nonmoving party fails to discharge that burden—for example
19 by remaining silent—its opportunity is waived and its case
20 wagered." *Guarino v. Brookfield Twp. Trustees*, 980 F.2d 399, 405
21 (6th Cir. 1992).

22 **Analysis**

23 Plaintiff's complaint asserts five federal causes of action
24 and six state law causes of action against the defendants: (1)
25 Fourth Amendment excessive force against defendants Mendoza and
26 Surratt; (2) municipal liability against defendant Carson City for
27 allowing indiscriminate use of police canines and tasers where
28 lesser force would be effective; (3) Fourteenth Amendment malicious

1 prosecution against Mendoza and Surratt; (4) municipal liability
2 against Carson City for an alleged policy or custom that resulted
3 in malicious prosecutions; (5) false arrest against Mendoza and
4 Surratt; (6) state law malicious prosecution against Mendoza and
5 Surratt; (7) false imprisonment against Mendoza and Surratt; (8)
6 negligent hiring, training, and supervision against Carson City;
7 (9) respondeat superior against Carson City; (10) intentional
8 infliction of emotional distress against Mendoza and Surratt; and
9 (11) Eighth Amendment cruel and unusual punishment and Fourteenth
10 Amendment deliberate indifference to medical needs against
11 defendant Ramsey, as well as a municipal liability claim against
12 Carson City based thereon.

13 **I. Fourth Amendment Excessive Force**

14 Plaintiff asserts a claim of excessive force against Mendoza
15 and Surratt based on their combined use of the taser and the police
16 canine to effectuate plaintiff's arrest.

17 To prove a violation under § 1983, a plaintiff must establish
18 that the defendant (1) acting under color of law (2) deprived
19 plaintiff of the rights, privileges, or immunities secured by the
20 Constitution or the laws of the United States. *Gibson v. United*
21 *States*, 781 F.2d 1334, 1338 (9th Cir. 1986). Plaintiff alleges,
22 and defendants do not dispute, that they were acting under the
23 color of law. The issue is therefore whether the defendants
24 violated a constitutional right of the plaintiff. In this first
25 claim for relief, plaintiff asserts that by employing excessive
26 force in his arrest, Mendoza and Surratt violated his Fourth
27 Amendment right to be free of unreasonable search and seizure.

28 A claim that officers have used excessive force in the course

1 of seizing a person is analyzed under the Fourth Amendment's
2 objective reasonableness standard. *Scott v. Harris*, 550 U.S. 372,
3 381 (2007) (citing *Graham v. Connor*, 490 U.S. 386, 388 (1989)).
4 The test is "whether the officers' actions are 'objectively
5 reasonable' in light of the facts and circumstances confronting
6 them, without regard to their underlying intent or motivation."
7 *Hooper v. County of San Diego*, 629 F.3d 1127, 1133 (9th Cir. 2011).
8 To determine if a Fourth Amendment violation has occurred, the
9 court first assesses the gravity of the intrusion by evaluating the
10 type and amount of force inflicted. *Miller v. Clark County*, 340
11 F.3d 959, 964 (9th Cir. 2003). The court then balances "the extent
12 of the intrusion on the individual's Fourth Amendment rights
13 against the government's interests" in order "to determine whether
14 the officer's conduct was objectively reasonable based on the
15 totality of the circumstances." *Espinosa v. City & County of San*
16 *Francisco*, 598 F.3d 528, 537 (9th Cir. 2010).

17 The reasonableness of a particular use of force must be
18 judged from the perspective of a reasonable officer on
19 the scene, rather than with the 20/20 vision of
20 hindsight. To do so, a court must pay careful attention
21 to the facts and circumstances of each particular case,
22 including [1] the severity of the crime at issue, [2]
23 whether the suspect poses an immediate threat to the
24 safety of the officers or others, and [3] whether he is
25 actively resisting arrest or attempting to evade arrest
26 by flight. We also consider, under the totality of the
27 circumstances, the quantum of force used, the
28 availability of less severe alternatives, and the
suspect's mental and emotional state. All determinations
of unreasonable force, however, must embody allowance for
the fact that police officers are often forced to make
split-second judgments—in circumstances that are tense,
uncertain, and rapidly evolving—about the amount of force
that is necessary in a particular situation.

Hayes v. County of San Diego, 736 F.3d 1223, 1232 (9th Cir. 2013)
(internal punctuation and citations omitted).

1 Plaintiff argues in opposition to summary judgment that the
2 deputies lacked probable cause to arrest him for disturbing the
3 peace and therefore the arrest was unlawful, the resulting use of
4 force and detention were unreasonable, and plaintiff was justified
5 in his actions. Specifically, plaintiff argues that under Nevada
6 law officers may arrest for a misdemeanor only where it is
7 committed in their presence, Nev. Rev. Stat. § 171.124, that
8 disturbing the peace is a misdemeanor, and that what Mendoza
9 observed of plaintiff's behavior did not amount to disturbing the
10 peace.

11 Under the Carson City Municipal Code, it is disorderly conduct
12 "for any person to . . . disturb the peace and quiet of any person,
13 family or neighborhood by loud, violent or offensive language, or
14 by boisterous, tumultuous or offensive conduct" Carson
15 City Mun. Code § 8.04.010. Plaintiff asserts that talking to a
16 tenant while wearing underwear on his head and carrying and trying
17 to sell a bottle of alcohol does not meet this definition because
18 it is not loud or offensive language nor boisterous or offensive
19 conduct. In particular, plaintiff appears to assert that Mendoza's
20 post hoc description of the discussion as "loud" creates an issue
21 of fact where Mendoza initially described the conversation as only
22 "vocal" in his report.

23 Plaintiff's argument in this respect is unpersuasive. Already
24 aware that a man had been knocking on tenants' doors late at night
25 while carrying a bottle of alcohol, Mendoza arrived on scene and
26 personally observed plaintiff, wearing what appeared to be women's
27 underpants on his head and carrying a bottle of liquor, talking at
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1 least "vocally" to, and yelling profanities at, a tenant.⁵ It was
2 nearly midnight. In the context of the tenants' reports, it would
3 have therefore been clear to a reasonable officer that plaintiff
4 was disturbing the peace and quiet of the apartment tenants with
5 either "loud . . . or offensive language" or "boisterous . . . or
6 offensive conduct." Mendoza was thus authorized to arrest
7 plaintiff for the offense of disorderly conduct.

8 Plaintiff's second argument is that even if the deputies had
9 probable cause, the force they used to arrest him was unreasonable.
10 He argues that none of his conduct justified the escalation of
11 force the deputies applied because he was seated on the ground and
12 "highly intoxicated," suggesting, it appears, that he was in no
13 position to take action that could harm the deputies. Plaintiff
14 also argues that a reasonable juror could conclude his movement
15 upon being tased was an involuntary physical response to the tase
16 and not a move of aggression or flight. He argues escape would
17 have been nearly impossible with two officers and a police canine
18 surrounding him. Plaintiff also argues that he was on all fours,
19 and therefore a reasonable juror could conclude that his attempts
20 to get up were not attempts to get on his feet but instead were
21 attempts to get on his knees so he could be handcuffed. Plaintiff
22 argues that the crime for which he was being arrested was not a
23 serious crime and involved no violence. Finally, plaintiff argues
24 that the officers could have used much less force, including no

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26 ⁵ The court is not persuaded by plaintiff's argument that Mendoza
27 changed his story from the time of his report to the time of his deposition
28 in order to manufacture probable cause. A description of the conversation
as loud is not materially different from a description of the conversation
as "vocal." Plaintiff has not taken issue with Mendoza's testimony that
plaintiff had also been yelling profanities.

1 force at all by simply issuing a citation and notice to appear.

2 Defendants assert that their escalating use of force was
3 necessary and reasonable under the circumstances because plaintiff
4 was actively and aggressively resisting arrest, including
5 repeatedly striking the police canine. Defendants assert that
6 because plaintiff was not compliantly yielding or physically
7 subdued and was aggressive they had the right to use intermediate
8 force, citing *Miller v. Clark County*, 340 F.3d 959 (9th Cir. 2003).

9 In addition, defendants argue that there is no evidence that they
10 encouraged the canine to bite more forcefully or for longer than it
11 would have otherwise done, and that plaintiff's substantial forearm
12 wound is most logically the result of his own resistance to arrest
13 and battering of the canine and not of any provocation of the
14 canine's bite by the defendants. Finally, defendants assert that a
15 citation and notice to appear was not reasonable under the
16 circumstances given plaintiff's highly intoxicated state and the
17 fact there was no way to remove him from the area - where he was
18 disturbing the peace - absent arrest.

19 A question of fact exists as to the degree to which plaintiff
20 resisted arrest, even under the defendants' version of the events.
21 A jury could conclude the plaintiff's conduct was in fact
22 relatively mild and perhaps even passive rather than threatening.
23 That, combined with the relatively minor offense for which
24 plaintiff was being arrested - disorderly conduct - creates an
25 issue for the trier of fact as to whether the officers' response to
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1 plaintiff's resistance was objectively reasonable.⁶ Summary
2 judgment must therefore be **DENIED** as to plaintiff's excessive force
3 claim against Mendoza and Surratt.

4 **II. Municipal Liability Related to Excessive Force**

5 Plaintiff asserts a claim of municipal liability against
6 defendant Carson City based on an alleged policy and custom of
7 allowing indiscriminate use of tasers and canines when lesser force
8 would be effective.

9 A municipality may be held liable only where it inflicts an
10 injury; it may not be held liable under a respondeat superior
11 theory. *Monell v. Dep't of Social Servs. of City of New York*, 436
12 U.S. 658, 691 (1978); *Gibson v. County of Washoe*, 290 F.3d 1175,
13 1185 (9th Cir. 2002). A municipality may be liable for injuries
14 inflicted pursuant to its own policies, regulations, customs, or
15 usage. *Chew v. Gates*, 27 F.3d 1432, 1444 (9th Cir. 1994). In
16 order for the municipality to be held liable, "there must be a
17 direct causal link between a municipal policy or custom and the
18 alleged constitutional deprivation." *Villegas v. Gilroy Garlic*
19 *Festival Ass'n*, 541 F.3d 950, 957 (9th Cir. 2008) (internal
20 quotation marks omitted).

21
22 ⁶Defendants' reliance on *Miller* is insufficiently persuasive at this
23 stage of the proceedings. First, the facts of *Miller* differ in several
24 material respects from this case. Specifically, in *Miller* there was some
25 indication the plaintiff could be armed and the plaintiff had actually fled
26 from the officers and was in an area that the plaintiff knew well but the
27 officers did not. There is no evidence currently before the court
28 suggesting that the plaintiff in this case could have been armed, nor had
he fled. The court is therefore not convinced that plaintiff could have
"generat[ed] surprise, aggression, and death," *id.* at 965, in the same way
as the plaintiff in *Miller*. Further, the court would note that *Miller* was
decided after a trial, not on summary judgment. Accordingly, the court
there had before it all the relevant facts and was able to resolve disputed
issues of material fact, which at this stage the court cannot do.

1 The complaint alleges that Carson City has "approved of the
2 indiscriminate use of K-9's and tasers to obtain compliance where
3 lesser forms of force would accomplish the same objectives. . . ."
4 (Pl. Compl. ¶ 29). Plaintiff asserts that Carson City deputies
5 "routinely" use canines in passive situations and therefore there
6 is a practice of "employing attack canines on arrestees, regardless
7 of any threat assessment." The only evidence plaintiff cites for
8 this assertion is the deposition testimony of Surratt, who when
9 asked whether he brings out his canine as standard procedure,
10 stated "I bring my canine out a lot to deter resistance, yes."
11 (Mot. Summ. J. Ex. 2 (Surratt Dep. 7:14-15)). This evidence is not
12 only insufficient to establish a policy, as Surratt testified only
13 that he routinely brings out canines to deter resistance, but it is
14 also insufficient to establish that the canines are actually used
15 to bite passive arrestees, as Surratt testifies only that he
16 routinely brings out the canine to *deter resistance*. Accordingly,
17 plaintiff has failed to present triable issues of fact that would
18 support a municipal liability claim against Carson City based on a
19 custom, policy, or practice of employing excessive force through
20 indiscriminate use of police canines and tasers. Summary judgment
21 will therefore be granted on this claim.⁷

22 **III. Fourteenth Amendment Malicious Prosecution**

23 Plaintiff asserts a claim of malicious prosecution under §
24 1983 against defendants Mendoza and Surratt.

25 "In order to prevail on a § 1983 claim of malicious
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27 ⁷ In his opposition, plaintiff also argues the City was deliberately
28 indifferent because canines are trained to not let go until commanded to do
so. However, no such claim is included in the plaintiff's complaint.

1 prosecution, a plaintiff must show that the defendants prosecuted
2 him with malice and without probable cause, and that they did so
3 for the purpose of denying him equal protection or another specific
4 constitutional right." *Awabdy v. City of Adelanto*, 368 F.3d 1062,
5 1066 (9th Cir. 2004) (internal punctuation omitted); see also *Haupt*
6 *v. Dillard*, 17 F.3d 285, 290 (9th Cir. 1994).

7 "[P]robable cause is an absolute defense to malicious
8 prosecution." *Lassiter v. City of Bremerton*, 556 F.3d 1049, 1054-
9 55 (9th Cir. 2009). "Probable cause to arrest exists when officers
10 have knowledge or reasonably trustworthy information sufficient to
11 lead a person of reasonable caution to believe that an offense has
12 been or is being committed by the person being arrested." *Fayer v.*
13 *Vaughn*, 649 F.3d 1061, 1064 (9th Cir. 2011).

14 As already noted, plaintiff was charged with five crimes: (1)
15 disorderly conduct; (2) mistreatment of a police animal; (3) using
16 false information to avoid prosecution; (4) resisting a public
17 officer; and (5) alternative sentencing violation (probation). It
18 is not clear whether plaintiff bases his claim on all five counts,
19 but the court will address each in turn.

20 Disorderly conduct occurs when a person "disturb[s] the peace
21 and quiet of any person, family or neighborhood by loud, violent or
22 offensive language, or by boisterous, tumultuous or offensive
23 conduct" Carson City Mun. Code § 8.04.010. Plaintiff was
24 reportedly knocking on people's homes at 11:20 p.m., carrying and
25 trying to sell a bottle of liquor, and wearing underwear on his
26 head. Mendoza observed plaintiff, with the underwear on his head,
27 having a loud conversation with a tenant and yelling profanities.
28 To a person of reasonable caution, plaintiff's summoning of the

1 apartment tenants to their doors shortly before midnight for the
2 purpose of selling them his open bottle of alcohol, and his
3 engaging of the tenants in vocal or loud conversations that
4 included the yelling of profanities, was upsetting the peace and
5 quiet of the apartment tenants. The officers therefore had
6 probable cause to arrest and charge plaintiff with disorderly
7 conduct.

8 Under Nev. Rev. Stat. Ann. § 574.105(a), it is unlawful for a
9 person to "willfully and maliciously . . . beat [or] strike . . . a
10 police animal." Here, the deputies observed plaintiff striking the
11 police canine on the head repeatedly, a fact plaintiff does not
12 deny. Although plaintiff asserts the violence was an act of
13 "instinctive self-defense" in response to an unlawful arrest, the
14 court has already held that the arrest was lawful. Given
15 plaintiff's striking of the canine during the arrest, probable
16 cause existed to charge plaintiff with mistreatment of a police
17 animal.

18 Under Nev. Rev. Stat. Ann. § 205.463(2), "a person who
19 knowingly (a) [o]btains any personal identifying information of
20 another person; and (b) [u]ses the personal identifying information
21 to avoid or delay being prosecuted for an unlawful act, is guilty
22 of a category C felony. . . ." Plaintiff does not deny that he
23 used his brother's name to avoid detection for a probation
24 violation, and in fact plaintiff pleaded guilty to that charge.
25 Accordingly, no claim of malicious prosecution can be based on this
26
27
28

1 charge.⁸

2 Under Nev. Rev. Stat. Ann. § 199.280(3), a "person who, in any
3 case or under any circumstances not otherwise specially provided
4 for, willfully resists, delays or obstructs a public officer in
5 discharging or attempting to discharge any legal duty of his or her
6 office shall be punished . . . [w]here no dangerous weapon is used
7 in the course of such resistance, obstruction or delay, for a
8 misdemeanor." At a minimum, an undisputed fact of this case is
9 that plaintiff refused to place his arms behind his back to be
10 handcuffed despite being ordered to do so. Accordingly, the
11 deputies had probable cause to charge plaintiff with resisting a
12 public officer.

13 Finally, plaintiff does not dispute that he was on probation
14 at the time of this incident, that one of his conditions of
15 probation was to abstain from alcohol, and that he was found by the
16 deputies to be intoxicated. Accordingly, there was probable cause
17 to charge plaintiff with a violation of his probation.

18 In sum, the court finds no issue of material fact as to
19 whether there was probable cause to charge plaintiff with all five
20 offenses. Moreover, plaintiff has presented no evidence that the
21 deputies maliciously charged him for the purpose of denying him a
22 constitutional right. Plaintiff's only argument on this point is

23
24 ⁸Plaintiff's argument based on *Carey v. Nevada Gaming Control Bd.*, 279
25 F.3d 873 (9th Cir. 2002) is not only irrelevant given his guilty plea to
26 this charge but also misplaced. Unlike in *Carey*, where the plaintiff was
27 arrested for refusing to provide identifying information and the Ninth
28 Circuit held the statute criminalizing such was unconstitutional, here the
plaintiff had already been arrested and was later charged because he had
represented himself as someone else in order to avoid detection for a
probation violation. *Carey* says nothing about the constitutionality of the
statute under which plaintiff was charged in this case.

1 that malice can be inferred from a lack of probable cause. The
2 court has rejected this argument. Accordingly, as plaintiff has
3 shown no genuine issue of material fact with respect to his § 1983
4 malicious prosecution claim, defendants are entitled to summary
5 judgment on this claim.

6 **IV. Municipal Liability Related to Malicious Prosecution**

7 Plaintiff asserts a municipal liability claim against
8 defendant Carson City based on an alleged policy and custom of
9 allowing malicious prosecution.

10 There is no evidence in the record to substantiate this claim.
11 Moreover, plaintiff has not shown that he suffered a violation of
12 his right against malicious prosecution; therefore the city cannot
13 be liable for causing a violation of said right. See *City of Los*
14 *Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam).
15 Accordingly, Carson City is entitled to summary judgment on this
16 claim.

17 **V. False Arrest**

18 Plaintiff asserts a claim of false arrest against defendants
19 Mendoza and Surratt.

20 "In order to prove false arrest, a plaintiff must show the
21 defendant instigated or effected an unlawful arrest." *Nau v.*
22 *Sellman*, 757 P.2d 358, 360 (Nev. 1988). For the reasons already
23 discussed, the court holds as a matter of law that plaintiff's
24 arrest was not unlawful as there was probable cause to arrest him
25 for disorderly conduct. Defendants are therefore entitled to
26 summary judgment on this claim.

VI. State Law Malicious Prosecution

Plaintiff asserts a claim of malicious prosecution under state law against defendants Mendoza and Surratt.

"[T]he elements of a malicious prosecution claim are: (1) want of probable cause to initiate the prior criminal proceeding; (2) malice; (3) termination of the prior criminal proceedings; and (4) damage." *LaMantia v. Redisi*, 38 P.3d 877, 879 (Nev. 2002).

As discussed, probable cause existed to charge plaintiff with the five offenses. Further, plaintiff has presented no evidence of malicious intent. Defendants are therefore entitled to summary judgment on this claim.

VII. False Imprisonment

Plaintiff asserts a claim of false imprisonment against defendants Mendoza and Surratt. In Nevada, "[f]alse imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." Nev. Rev. Stat. § 200.460. Probable cause is a defense to false imprisonment. *Nelson v. City of Las Vegas*, 665 P.2d 1141, 1144 (Nev. 1983).

As probable cause existed to arrest plaintiff and to charge him with the five offenses, plaintiff cannot prove a claim of false imprisonment. Defendants are entitled to summary judgment on this claim.

VIII. Negligent Hiring, Training, and Supervision

Plaintiff asserts a claim of negligent hiring, training, and supervision against Carson City based on Mendoza, Surratt, and Ramsey's alleged unlawful acts.

Negligent hiring imposes a general duty on employers to ensure

1 that employees are fit for their positions. *Burnett v. C.B.A.*
2 *Security Serv., Inc.*, 820 P.2d 750, 752 (Nev. 1991). "An employer
3 breaches this duty when it hires an employee even though the
4 employer knew, or should have known, of that employee's dangerous
5 propensities." *Hall v. SSF, Inc.*, 930 P.2d 94, 98 (Nev. 1996).
6 Plaintiff's opposition points to no evidence that Carson City was
7 negligent in hiring Mendoza, Surratt, or Ramsey. Defendants are
8 therefore entitled to summary judgment on the claim of negligent
9 hiring.

10 An employer also has a duty to use reasonable care in
11 training, supervising, and retaining its employees to make sure
12 that the employees are fit for their positions. *Hall*, 930 P.2d at
13 99. Plaintiff argues that Carson City was negligent because it
14 inadequately trained its officers and canines, allowed officers to
15 use canines on every arrest, and allowed canines to lock and hold.
16 Plaintiff also argues that Carson City was negligent "as to the
17 City jail's recordkeeping."

18 Plaintiff does not elaborate on how the city jail's
19 recordkeeping was deficient. His argument that documents exist
20 showing he should have been treated three times a week does not
21 establish a triable issue of fact on this claim. At any rate,
22 plaintiff has not shown that any such deficiencies caused him any
23 harm, as he received treatment for his wound that eventually healed
24 his wound. Therefore Carson City is entitled to summary judgment
25 on this aspect of plaintiff's claim.

26 There is no evidence that Carson City trains deputies to
27 deploy canines on "every arrest" or that officers are inadequately
28 trained with respect to deploying canines. Accordingly summary

1 judgment will be granted as to that part of plaintiff's claim.

2 Finally, although Carson City does not appear to dispute that
3 it trains its canines to "bite and hold," no such claim is included
4 in plaintiff's complaint.

5 **IX. Respondeat Superior**

6 Plaintiff asserts a claim of respondeat superior against
7 Carson City based on Mendoza and Surratt's alleged intentional
8 torts because their conduct was foreseeable and authorized and
9 affirmatively ratified after the fact.

10 An employer is liable under a respondeat superior theory for
11 acts committed by its employee if those acts are committed within
12 the course and scope of the employment duties. See *Rockwell v. Sun*
13 *Harbor Budget Suites*, 925 P.2d 1175, 1179 (Nev. 1996) ("[A]n
14 actionable claim on a theory of respondeat superior requires proof
15 that (1) the actor at issue was an employee, and (2) the action
16 complained of occurred within the scope of the actor's
17 employment.").

18 Because, as has been and will be discussed, plaintiff has not
19 shown any actionable state law claim underlying a respondeat
20 superior claim, the respondeat superior claim fails. Carson City
21 is entitled to summary judgment on this claim.

22 **X. Intentional Infliction of Emotional Distress**

23 Plaintiff asserts a claim of intentional infliction of
24 emotional distress against defendants Mendoza and Surratt.

25 The elements of an IIED claim are: (1) extreme and outrageous
26 conduct with either the intention of, or reckless disregard for,
27 causing emotional distress; (2) the plaintiff suffered severe or
28 extreme emotional distress; and (3) actual or proximate causation.

1 *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 989 P.2d 882,
2 886 (Nev. 1999). The defendant's actions must "go beyond all
3 possible bounds of decency [and be] atrocious and utterly
4 intolerable." *Hirschhorn v. Sizzler Rests. Int'l, Inc.*, 913 F.
5 Supp. 1393, 1401 (D. Nev. 1995).

6 Defendants assert that there is no evidence that Mendoza or
7 Surratt engaged in extreme or outrageous conduct, and that their
8 use of the canine and the taser was reasonable and justified under
9 the circumstances. Defendants also argue that plaintiff has
10 proffered no evidence that the defendants acted with the intention
11 to cause harm or with reckless disregard for causing plaintiff
12 emotional distress. Finally, defendants argue there is no evidence
13 plaintiff suffered any extreme or severe emotional distress.

14 Plaintiff contends that because he was battered and assaulted,
15 this claim should be allowed to proceed pursuant to *Olivero v.*
16 *Lowe*, 995 P.2d 1023, 1026-27 (Nev. 2000). However, plaintiff has
17 proffered no evidence - and has made no argument - that he suffered
18 severe or extreme emotional distress as a result of Mendoza's and
19 Surratt's actions. Accordingly, plaintiff has failed to show a
20 genuine issue of material fact on one of the essential elements of
21 this claim. Defendants are therefore entitled to summary judgment
22 on this claim.

23 **XI. Eighth Amendment Cruel and Unusual Punishment/Fourteenth**

24 **Amendment Deliberate Indifference to Serious Medical Needs**

25 Plaintiff asserts a claim of deliberate indifference against
26 defendant Ramsey, as well as a derivative municipal liability claim
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28

1 based on this conduct.⁹

2 Under the Eighth Amendment, prison officials must take
3 reasonable measures to guarantee inmate safety, which includes
4 addressing serious medical needs. See *Farmer v. Brennan*, 511 U.S.
5 825, 833 (1994); *Hoptowit v. Ray*, 682 F.2d 1237, 1253 (9th Cir.
6 1982), *abrogated on other grounds by Sandin v. O'Connor*, 515 U.S.
7 472 (1995). Because plaintiff was a pre-trial detainee, his claims
8 arise under the Fourteenth Amendment Due Process Clause. See *Bell*
9 *v. Wolfish*, 441 U.S. 520, 535 n.16 (1979). However, because the
10 rights under both the Eight and the Fourteenth Amendments are
11 comparable, the Ninth Circuit applies the same standards to both
12 claims. *Frost v. Agnos*, 152 F.3d 1124, 1128 (9th Cir. 1998).

13 To state a claim under the Eighth and Fourteenth Amendments,
14 plaintiff must show (1) an objectively, sufficiently serious
15 deprivation; (2) that the individual defendants were "deliberately
16 indifferent" to plaintiff's health and safety - that is, they must
17 have had a "sufficiently culpable state of mind," see *Farmer*, 511
18 U.S. at 834; *Est. of Ford v. Ramirez-Palmer*, 301 F.3d 1043, 1049
19 (9th Cir. 2002); and (3) harm caused by the indifference. See *Jett*
20 *v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006).

21
22 ⁹ Although the factual allegations of plaintiff's complaint also assert
23 that Mendoza and Surratt were deliberately indifferent to plaintiff's
24 medical needs, including by refusing to allow him to be transported to the
25 hospital in the ambulance, Count 11 discusses only Ramsey's and Carson
26 City's alleged deficiencies. Nor does plaintiff argue in his opposition
27 that Mendoza and Surratt were deliberately indifferent. However, even if
28 plaintiff were raising such a claim, the undisputed facts are that Mendoza
and Surratt immediately summoned fire and rescue, who bandaged plaintiff's
wound, and then took plaintiff to the hospital. Such conduct was not, as
a matter of law, deliberately indifferent to plaintiff's medical needs.
Further, the evidence does not support any claim that the officers refused
to allow plaintiff to be transported in the ambulance, but even if they did,
there is no evidence such caused plaintiff further harm.

1 A prison official is deliberately indifferent to an inmate's
2 serious medical needs where he or she "knows of and disregards an
3 excessive risk to inmate safety." *Farmer*, 511 U.S. at 837. The
4 defendants must both (1) be aware of facts from which the inference
5 could be drawn that a substantial risk of serious harm exists, and
6 (2) they must also draw the inference. *Id.*; *Toguchi v. Chung*, 391
7 F.3d 1051, 1057 (9th Cir. 2004). The plaintiff "need not show that
8 a prison official acted or failed to act believing that harm
9 actually would befall an inmate; it is enough that the official
10 acted or failed to act despite his knowledge of a substantial risk
11 of serious harm." *Farmer*, 511 U.S. at 842. Mere negligence is
12 insufficient to establish deliberate indifference. *Broughton v.*
13 *Cutter Labs.*, 622 F.2d 458, 460 (9th Cir. 1980).

14 When the Eighth Amendment deprivation is a failure to treat a
15 serious medical need, deliberate indifference requires showing (a)
16 a purposeful act or failure to respond to a prisoner's pain or
17 possible medical need; and (b) harm caused by the indifference. See
18 *Jett*, 439 F.3d at 1096. Although the Ninth Circuit does not
19 require a *de minimis* physical injury to sustain an Eighth Amendment
20 claim, *Oliver v. Keller*, 289 F.3d 623, 628 (9th Cir. 2002), a delay
21 in medical treatment is a sustainable claim only if a resulting
22 harm is shown. See *Berry v. Bunnell*, 39 F.3d 1056, 1057 (9th Cir.
23 1994).

24 Plaintiff asserts that defendant Ramsey was deliberately
25 indifferent to his serious medical needs in the way he treated
26 plaintiff's arm wound. First, plaintiff suggests that Ramsey's
27 treatment may not have been proper because Ramsey testified that
28 plaintiff was sent to wound care twice a week but Carson City

1 Sheriff's Office records indicate plaintiff should have been sent
2 three times a week. Plaintiff offers no support for his argument
3 that Carson City records show he should have been sent three times
4 a week for treatment but was actually sent only twice a week. The
5 records are not even before the court and were merely referenced in
6 a footnote to defendants' motion for summary judgment for the
7 opposite conclusion: that the records show plaintiff was
8 actually treated three times a week at wound care. (See Mot. Summ.
9 J. 7 n.3). Accordingly, the mere speculation and conjecture of the
10 plaintiff that perhaps he was not treated as often as he should
11 have been cannot establish any genuine issue of material fact that
12 Ramsey was deliberately indifferent to his medical needs.

13 Second, plaintiff argues Ramsey may not be credible because
14 while he claimed the wound was healing, the hospital found it was
15 not. (See Pl. Opp'n 6). However, the undisputed evidence is that
16 Ramsey believed the wound was healing until one day it was not, and
17 it was only at this point that plaintiff was sent to the hospital
18 for further care. That the wound clinic found the wound was not
19 healing at a time Ramsey also thought the wound looked worse does
20 not impugn Ramsey's credibility. Accordingly, this alleged
21 discrepancy also does not create a genuine issue of material fact
22 on this claim.

23 The undisputed facts establish that plaintiff received a
24 significant amount of medical treatment for his wound from Ramsey,
25 including daily dressing changes, cleaning of the wound, and
26 administration of antibiotics and pain medication. It is
27 undisputed that the wound appeared to be healing, and when it
28 appeared to Ramsey it no longer was, he asked for a second opinion

1 and then referred plaintiff for wound care at the hospital. The
2 court concludes there are no issues of material fact on which the
3 trier of fact could conclude that Ramsey's treatment of plaintiff's
4 wound was deliberately indifferent.

5 As to plaintiff's municipal liability claim against Carson
6 City, plaintiff points to no evidence showing Carson City
7 "repeated[ly] den[ies] adequate care."¹⁰ (Compl. ¶ 50). Further, as
8 there is no underlying violation there cannot be a *Monell* claim
9 based thereon. See *City of Los Angeles v. Heller*, 475 U.S. 796,
10 799 (1986) (per curiam).

11 Accordingly, defendants are entitled to summary judgment on
12 plaintiff's deliberate indifference claim.

13 **XII. Qualified Immunity**

14 Defendants Mendoza, Surratt, and Ramsey assert they are
15 entitled to qualified immunity on all of plaintiff's federal claims
16 against them. Because the court has found no constitutional
17 violation with respect to the malicious prosecution and deliberate
18 indifference claims, the court need not consider whether qualified
19 immunity applies with respect to those claims. The court must,
20 however, address Mendoza and Surratt's claim of qualified immunity
21 with respect to plaintiff's excessive force claim.

22 Qualified immunity protects "government officials performing
23 discretionary functions . . . from liability for civil damages
24 insofar as their conduct does not violate clearly established
25 statutory or constitutional rights of which a reasonable person

26
27 ¹⁰The complaint also alleges that various unknown individuals ignored
28 plaintiff's repeated kites for medical care, but plaintiff has not
identified any such individuals and has not explained what treatment he
requested in his kites that he did not receive.

1 would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
2 "The qualified immunity question turns on the 'objective legal
3 reasonableness' of the action." *Herb Hallman Chevrolet, Inc. v.*
4 *Nash-Holmes*, 169 F.3d 636, 642 (9th Cir. 1999). To be clearly
5 established, the law "must be established at more than an abstract
6 level; it must have been clearly established in a more
7 particularized, and hence more relevant, sense: The contours of the
8 right must be sufficiently clear that a reasonable officer would
9 understand that what he is doing violates that right." *Cruz v.*
10 *Kauai County*, 279 F.3d 1064, 1069 (9th Cir. 2002).

11 To address assertions of qualified immunity at summary
12 judgment, the court employs a two-pronged inquiry. The first prong
13 "asks whether the facts, taken in the light most favorable to the
14 party asserting the injury, show the officer's conduct violated a
15 federal right." *Tolan v. Cotton*, - U.S. -, 134 S. Ct. 1861, 1865
16 (2014) (internal punctuation omitted). The second prong "asks
17 whether the right in question was 'clearly established' at the time
18 of the violation." *Id.* at 1866. The court "may not resolve
19 genuine disputes of fact in favor of the party seeking summary
20 judgment" under either prong. *Id.*

21 As discussed above, considering the evidence in the light most
22 favorable to plaintiff, a genuine issue of material fact exists as
23 to whether Mendoza's and Surratt's actions violated plaintiff's
24 right to be free of excessive force. The question cannot be
25 resolved at summary judgment. The next question, then, is whether,
26 under clearly established law, it would have been clear to the
27 defendants that their actions violated that right.

28 At the time of this incident, "[t]he right to be free from the

1 application of non-trivial force for engaging in mere passive
2 resistance was clearly established." *Gravelet-Blondin v. Shelton*,
3 728 F.3d 1086, 1092 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 1292
4 (2014). "While 'purely passive resistance can support the use of
5 some force, [] the level of force an individual's resistance will
6 support is dependent on the factual circumstances underlying that
7 resistance." *Id.* at 1091, quoting *Bryan v. MacPherson*, 630 F.3d
8 805, 830 (9th Cir. 2010). It was further clearly established that
9 the use of a taser dart was an intermediate level of force that
10 must be justified by a strong governmental interest. *See Bryan*,
11 630 F.3d 805. Finally, it was clearly established that under
12 certain circumstances employing a police canine may result in
13 excessive force. *See Watkins v. City of Oakland*, 145 F.3d 1087,
14 1093 (9th Cir. 1998); *Mendoza v. Block*, 27 F.3d 1357, 1362 (9th
15 Cir. 1994) ("[W]hen 'the defendants' conduct is so patently
16 violative of the constitutional right that reasonable officials
17 would know without guidance from the courts' that the action was
18 unconstitutional, closely analogous pre-existing case law is not
19 required to show that the law is clearly established.").

20 The question of whether the officers' conduct in this case
21 violated clearly established law turns on the objective
22 reasonableness of the defendants' conduct. Viewing the evidence in
23 a light most favorable to plaintiff, as the court must on summary
24 judgment, the facts are as follows. The decision to arrest
25 plaintiff for a misdemeanor, nonviolent crime was made only after
26 it was determined there was no way to provide plaintiff a way home.
27 Plaintiff was extremely intoxicated, he had made no aggressive
28 moves or threats toward the officers, and he did not appear to be

1 armed, nor did the defendants indicate they believed he was armed.
2 Plaintiff made no attempt to hide or escape. He appeared to be
3 cooperative. Before informing plaintiff that he was going to be
4 arrested, and before any perceived act of resistance by plaintiff,
5 Surratt brought out the police canine. When Mendoza told plaintiff
6 he was going to jail, plaintiff - who was sitting on the ground -
7 refused to put his arms behind his back and locked his arms in
8 front of him to resist Mendoza's efforts to pull his arms back for
9 handcuffing. After Mendoza warned plaintiff that if he continued
10 "to resist" he would be tasered, and plaintiff then tried to stand,
11 Mendoza applied the taser and plaintiff lunged forward onto his
12 knees in reaction to the taser. According to Mendoza, that is when
13 Surratt deployed the police canine, which bit plaintiff in the
14 buttocks.¹¹ Plaintiff fought off the dog and tried to stand;
15 Surratt then deployed the canine again, and this time the canine
16 held its bite on plaintiff's forearm for several seconds, causing a
17 severe puncture wound. Plaintiff repeatedly hit the canine as it
18 bit into his arm to dislodge the canine. Finally, after the canine
19 was recalled and as plaintiff tried to stand again, Mendoza,
20 without any additional warning, applied the taser dart. Plaintiff
21 was immobilized, and the handcuffs were applied. Thereafter, he
22 was transported to first the hospital and then jail. As a result
23 of the dog bite, plaintiff was treated for the wound to his forearm
24 for about four months and ultimately had two surgeries to repair
25 the wound.

27 ¹¹ Although Surratt testified at deposition that he gave plaintiff a
28 warning prior to deploying the canine, Mendoza did not state in his
deposition that such a warning was given.

1 Although Surratt has described plaintiff as "angry" and his
2 behavior as "aggressive" and increasingly violent, he points to no
3 objective facts to substantiate these conclusory statements. "A
4 simple statement by an officer that he fears for his safety or the
5 safety of others is not enough; there must be objective factors to
6 justify such a concern." *Gravelet-Blondin*, 728 F.3d at 1091,
7 quoting *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001).
8 The objective facts of this case - that plaintiff refused to put
9 his arms behind his back, tried to stand up, and hit the police
10 canine as it bit into his arm - at a minimum raise issues of fact
11 as to whether plaintiff was aggressive and violent or whether such
12 conduct constituted passive resistance and did not justify two
13 attacks by the canine, and the application of a contact tase and a
14 taser dart. It is for the trier of fact to determine whether the
15 force used by the officers under the facts of this case was
16 excessive and violated plaintiff's constitutional rights.

17 **XIII. Discretionary Immunity**

18 Defendants assert they are entitled to discretionary immunity
19 as to plaintiff's state law claims. However, because the court
20 finds no triable issue of fact on any of plaintiff's state law
21 claims, it is unnecessary to decide whether and to what extent the
22 defendants might be immune under Nev. Rev. Stat. § 41.032(2) for
23 their actions in this case.

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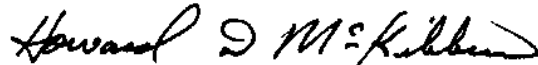
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1 **Conclusion**

2 In accordance with the foregoing, defendants' motion for
3 summary judgment is **DENIED** with respect to plaintiff's excessive
4 force against the individual defendants Mendoza and Surratt and is
5 **GRANTED** in all other respects.

6 **IT IS SO ORDERED.**

7 DATED: This 4th day of February, 2015.

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9 UNITED STATES DISTRICT JUDGE
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